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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

SALIM AHMED HAMDAN,
*Petitioner,*
v.
DONALD H. RUMSFELD, ET AL.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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# BRIEF OF AMICUS CURIAE HUMAN RIGHTS FIRST IN SUPPORT OF PETITIONER

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Deborah N. Pearlstein*
Director, U.S. Law and Security Program
Human Rights First
100 Maryland Avenue, N.E., Suite 500
Washington, D.C., 20002-5625
(202) 547-5692
*Counsel of Record

Avidan Cover
Human Rights First
333 7th Avenue, 13th Floor
New York, NY 10001-5004
(212) 845-5200
Counsel for Amicus Curiae


Date: September 7, 2005

## TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES.....ii

STATEMENT OF INTEREST OF AMICUS CURIAE.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....3

I. THE LEGALITY OF U.S. MILITARY COMMISSIONS AND ENFORCEABILITY OF U.S. TREATY OBLIGATIONS PRESENT FEDERAL QUESTIONS LEFT OPEN BY THIS COURT OF SURPASSING NATIONAL IMPORTANCE.....3

II. THE MILITARY COMMISSIONS CHALLENGE BOTH BASIC FAIR TRIAL RIGHTS AND THE RULE OF LAW AND WARRANT THIS COURT'S REVIEW.....8

III. FAILURE PROMPTLY TO RESOLVE THE FUNDAMENTAL ISSUES IN THIS CASE WILL HAVE PROFOUNDLY NEGATIVE CONSEQUENCES FOR THE UNITED STATES AND THOSE IT DETAINS.....13

CONCLUSION.....19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

## TABLE OF AUTHORITIES

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*Al-Marri v. Hanft*.....5
378 F Supp. 2d 673 (D.S.C. 2005)

*Alexander v. Holmes County Board of Education*.....17
396 U.S. 19 (1969)

*Bell v. Wolfish*, 441 U.S. 520 (1979).....14

*Chambers v. Florida*, 309 U.S. 227 (1940).....14

*Crawford v. Washington*, 541 U.S. 36 (2004).....9

*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).....3

*Ex parte Quirin*, 317 U.S. 1 (1942).....3, 6

*Ex parte Vallandigham*.....3
61 U.S. (1 Wall.) 243 (1864)

*Foster v. Florida*, 537 U.S. 990 (2002).....16

*Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991).....18

*Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).....5

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355 F. Supp. 2d 443 (D.D.C. 2005)

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374 F. Supp. 2d 1356 (J.P.M.L. 2005)

*In re Medley*, 134 U.S. 160 (1890).....16

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*Katzenbach v. McClung*, 379 U.S. 294 (1964).....17

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*Rasul v. Bush*, 124 S. Ct. 2686 (2004).....4

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*Younger v. Harris*, 401 U.S. 37 (1971).....11

*Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).....9

**CONSTITUTION, STATUTES, REGULATIONS**

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U.S. Const. amend. VI.....9

U.S. Const. amend. VIII.....17

U.S. Const. amend. XIV.....4

10 U.S.C. § 810.....4

10 U.S.C. §§ 836(a), 839(b) .....7

42 U.S.C. § 1981.....4

Geneva Convention Relative to the Treatment of.....4, 9
Prisoners of War (GPW), Aug. 12, 1949
6 U.S.T. 3316 arts. 5, 103, 105

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Persons in Time of War (1949)
6 U.S.T. 3516, arts. 72, 74

Protocol Additional to the Geneva Conventions of 12 Aug.
1949,.....9
And relating to the Protection of Victims of International Armed
Conflicts
1125 U.N.T.S. 3, art. 75

International Covenant on Civil and Political Rights.....9
Dec. 19, 1966, 999 U.N.T.S. 171 art. 14(d)

32 C.F.R. §§ 9.1-9.11.....*passim*

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57,833 (2001)

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Human.....13
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125 S. Ct. 972 (2005), No. 04-702

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Rumsfeld*,
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(D.D.C. filed Oct. 27, 2004)

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*Constitutional Discourse*, 97 COLUM. L. REV. (1997)

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*Russia*, at 2, 6,
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*Indonesia*, at 2, 20,
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*Commissions*, 96 AM. J. INT'L L. 337, 341 (2002)

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No. 04-0777L (W.D. Wa. filed April 6, 2004)

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http://www.defenselink.mil/releases/2005/nr20050718-4063.html

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Commission Procedures (Aug. 31, 2005)
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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Since 1978, Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. Human Rights First (HRF) works to support human rights activists who fight for basic freedoms and peaceful change at the local level; ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. Since 2002, HRF has consulted with the Pentagon in the formulation of military commission rules and procedures, has been one of a handful of international organizations invited to observe military commission proceedings at the U.S. Naval Base at Guantanamo Bay, Cuba, and has been working closely with interested parties there to promote compliance with fair trial procedures under U.S. and international law.

## SUMMARY OF THE ARGUMENT

Testing the legality of the first military commission trials since World War II, this case presents questions of Presidential power and the enforceability of modern U.S. treaty obligations – issues of surpassing national importance that this Court has not hesitated to engage during past conflicts in U.S. history.

The decision in this case by the U.S. Court of Appeals for the D.C. Circuit, holding that U.S. treaty obligations may not be enforced through the writ of habeas corpus, bears not only on the rights of Mr. Hamdan and others subject to the commissions, but also on the rights of 13,000 some detainees currently held in U.S. custody in the "war on terrorism" worldwide. That global

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[1] The parties in this case have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than Amicus and its counsel contributed monetarily to the preparation or submission of this brief.

detention system, now nearly four years old, is currently the subject of litigation throughout the U.S. federal courts and was the focus of this Court's attention in three separate cases in 2004. Continued uncertainty about the rights of those held in this system – particularly the enforceability of those rights in U.S. courts – serves neither the interests of the detainees, nor the United States, nor the rule of law itself.

Unlike any standard interlocutory criminal appeal or request for collateral review, where this Court can assume the fundamental lawfulness of the justice system below, the military commissions as structured deprive Mr. Hamdan of the most basic fair trial rights, and indeed, neglect the first principles of the rule of law. Since the commissions were announced by the President in November 2001, commission rules have been reissued, revised, or amended no fewer than eight times, most recently following the submission of Mr. Hamdan's petition for certiorari to this Court. Commission rules purport to reserve to the President the discretion to further change the rules at any time, and deny to Mr. Hamdan any rights under the terms of 'commission law.' If the idea of the rule of law includes, at a minimum, a system of publicly known regulations, set in advance, applied without arbitrariness, and enforced by fair and independent courts – the commissions fall short in every respect.

A decision by this Court to delay reviewing this case until some later stage in the proceedings is unlikely to yield further factual or legal development that would aid in this Court's deliberations – but certain to cause irreparable harm to Mr. Hamdan and those similarly situated. Mr. Hamdan has now been held for three years by U.S. forces – including more than two years before being charged with any offense, and almost a full year in solitary confinement. Pet. Br. 2. Whatever the legal consequences of such indefinite detention (including periods of prolonged solitary confinement and abuse), its physical and psychological toll has been profound.

Finally, longstanding U.S. efforts to advance democracy and the rule of law overseas are also now on hold, as repressive

regimes abroad point to the United States' establishment of military commissions as a basis on which to avoid their own responsibilities to maintain systems with independent judicial review. Such responses by the international community cannot, of course, be a basis for this Court's decision on the legal questions presented by Mr. Hamdan's case. But in evaluating whether to act sooner or later to resolve the questions presented, the Court is wise to consider such ongoing consequences of inaction.

## ARGUMENT

### I. THE LEGALITY OF U.S. MILITARY COMMISSIONS AND ENFORCEABILITY OF U.S. TREATY OBLIGATIONS PRESENT FEDERAL QUESTIONS LEFT OPEN BY THIS COURT OF SURPASSING NATIONAL IMPORTANCE

Supreme Court Rule 10 recognizes the propriety of granting a petition for a writ of certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). There can be no question here of the importance of the first military commission trials to be conducted since World War II. Pet. Br. 5-10; *see Ex parte Quirin*, 317 U.S. 1, 19 (1942) (hearing arguments in special term because of the "public importance of the questions," and the duty of the courts "to preserve unimpaired the constitutional safeguards of civil liberty"); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-19 (1866); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Particularly where, as here, a federal court of appeals has upheld a military commission order, this Court's intervention is critical. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions the order, the Court for all times has validated the principle").

The district court's vigorous affirmation of Mr. Hamdan's rights under the U.S. Constitution, treaties and laws, Pet. App. 35a-36a; 46a-47a, – and the conflicting ruling by the court of appeals in a wide-ranging decision rejecting the judicial enforceability of those treaty rights through the writ of habeas corpus, Pet. App. 10a, – provides this Court a thorough record on which to review pure questions of law left open by this Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004). In that case, which presented the question whether the U.S. federal courts have jurisdiction to hear habeas corpus challenges to the legality of detentions at the U.S. Naval Base at Guantanamo Bay, this Court noted that petitioners' claims describing their detention "unquestionably" described circumstances of custody in violation of the "laws or treaties of the United States." *Id.*, at 2698 n. 15. In Mr. Hamdan's case, the court of appeals recognized that it has jurisdiction to review Mr. Hamdan's habeas petition, but held that the "treaties of the United States," specifically the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Aug. 12, 1949, 6 U.S.T. 3316, provide no rights enforceable through habeas petitions in federal courts, Pet. App. 10a. This case thus presents the opportunity to determine whether habeas provides any enforceable remedy for rights like those "unquestionably" violated by the allegations in *Rasul*.[2]

The question is far from academic. The rights of those detained by the United States in the course of its "global war on terrorism" – detainees today numbering near 13,000 worldwide[3] –

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[2] Mr. Hamdan alleges, *inter alia*, that he has been denied a speedy trial in violation of 10 U.S.C. § 810; that his confinement violates the GPW, arts. 5, 103 and Army Regulation 190-8; that his confinement and insufficient process violates Common Article 3; that the military commissions violate the Equal Protection Clause and separation of powers established in the U.S. Constitution; that his detention violates 42 U.S.C. § 1981; that the commissions have been invested with subject matter jurisdiction contrary to the laws of war; and that the commissions lack personal jurisdiction over Mr. Hamdan. Petition for Writ of Mandamus, *Swift v. Rumsfeld*, No. 04-0777L (W.D. Wa. filed April 6, 2004) http://www.law.georgetown.edu/faculty/nkk/documents/Swift_000.pdf.

[3] As of June 25, 2005, the United States held 11,808 detainees in Iraq. *See* Ashraf Khalil and Patrick J. McDonnell, *U.S. Plans Expansion of Crowded Iraq Prisons*, L.A. TIMES, June 26, 2005, A1. As of May 1, 2005, the United States held 585

has been the subject of litigation throughout the U.S. federal courts for nearly four years. *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005); *In re Iraq and Afghanistan Detainees Litigation*, 374 F. Supp. 2d 1356 (J.P.M.L. 2005) (transferring lawsuits against Secretary of Defense and other military officials to District of Columbia); *Padilla v. Hanft*, 2005 WL 465691 (D.S.C. 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). (As discussed in Part III below, this prolonged uncertainty has caused grave problems for the detainees and the U.S. Government alike.) These issues seem likely to remain upon us for the foreseeable future, and this Court is the only body that may provide definitive resolution. *See Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting) ("It seems to me unsound to avoid questions of national importance when they are bound to recur.").

Resolving the enforceability of rights challenged by military commission trials is particularly urgent. In response to the court of appeals decision, the Defense Department announced that it would immediately resume commission proceedings against Mr. Hamdan as well as against three others: Ali Hamza Ahmad Sulayman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, and David Hicks. U.S. Dep't of Defense New Release: Military Commissions to Resume (July 18, 2005), http://www.defenselink.mil/releases/2005/nr20050718-4063.html. Twelve detainees at Guantanamo (including those just named) have been deemed eligible for trial under the President's Executive Order creating the military commissions, and the Defense Department announced that the Office of Military Commissions would continue to prepare "reason to believe" recommendations to the President concerning additional detainees."[4] With more than

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detainees in Afghanistan. Stephen Graham, *U.S. Frees 85 Afghans From Military Jails*, Assoc. Press Online, May 1, 2005. There are approximately 505 detainees at Guantanamo. U.S. Dep't of Defense Fact Sheet: Guantanamo Detainees by the Numbers (August 31, 2005). In addition, two detainees are held as enemy combatants in the United States. *See Al-Marri*, 378 F. Supp. 2d 673; *Padilla*, 2005 WL 465691.

[4] U.S. Dep't of Defense Fact Sheet: Guantanamo Detainees By the Numbers (August 31, 2005),

500 detainees still held at Guantanamo Bay, *supra* note 3, the prospect that dozens of commission trials will soon be underway looms large.

Indeed, beyond Guantanamo, the President retains discretion to subject any non-citizen to military commissions.

> [Those subject to trial by commission include] any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that . . . there is reason to believe that such individual . . . has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or . . . has knowingly harbored one or more individuals described [above] . . . and [] it is in the interest of the United States that such individual be subject to this order.

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 2(a) (Executive Order), 66 Fed. Reg. 57,833 (2001); *see also Remarks of President George W. Bush, Bush Speaks of Security To Group of U.S. Attorneys*, N.Y. Times, Nov. 30, 2001, B7 ("[I]f I determine that it is in the national security interest of our great land to try by military commission those who make war on America, then we will do so."). In contrast to the eight individuals President Roosevelt's order addressed in *Quirin*, 317 U.S. 1, 46, the President's Executive Order establishing the military commissions thus applies to the thousands currently in U.S. custody, and indeed presumably to

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http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf; *see also* U.S. Dep't of Defense New Release: Military Commissions to Resume (July 18, 2005), http://www.defenselink.mil/releases/2005/nr20050718-4063.html; Transcript of Remarks of Legal Advisor to the Appointing Authority for Military Commissions Brig. Gen. Thomas L. Hemingway, Special Defense Department Briefing on Military Commissions (August 31, 2005), http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html.

anyone the President identifies throughout the world who poses a threat to U.S. national security.

Critically, this Court should not decline to take up this case now with the expectation that the issues will return later to this Court's docket, after further legal or factual development. As the court of appeals itself recognized, well apart from the harsh conditions of Mr. Hamdan's detention, *infra*, at 7, the harm to Mr. Hamdan from being tried by a commission without jurisdiction over him would be irreparable. Pet. Br. 4 (quoting court of appeals ruling, App. 4a) ("setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction"). Detention pursuant to the President's Executive Order is also likely to last several years before this Court would have an opportunity to review it again. See Pet. Br. 29.

Further, there is no reason to expect that this Court would have a full or reliable factual record should it wait to review the case until commission trials proceed. Commission evidentiary standards are beneath those accepted by U.S. courts martial and criminal courts – standards set in part to help ensure evidence is accurate. *See* 10 U.S.C. §§ 836(a), 839 (b); Fed. R. Evid. 403; Mil. R. Evid. 403. Military commission regulations provide that "[e]vidence shall be admitted if, in the opinion of the Presiding Officer . . . the evidence would have probative value to a reasonable person." 32 C.F.R. §§ 9.6(d)(1), (3). Under this significantly lower standard, commission defendants may not then be permitted to challenge admission of evidence that would normally be excluded from judicial proceedings on grounds such as assertions of legal privilege, objections to hearsay, or allegations of mental or physical coercion, or even torture, against some detainees. *See* Letter from Military Commission Defense Counsel to Sen. John Warner, et al, re: Evidence Obtained through Torture (June 1, 2004), http://www.law.georgetown.edu/faculty/nkk/documents/hill.letter.pdf; *see also* Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1 (military commission prosecutor complained that he had been told any exculpatory

evidence would be withheld by the C.I.A and that other prosecutors misrepresented evidence); Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, Wall St. J., Aug. 1, 2005, B1. This difference, together with years of severe mistreatment suffered by Mr. Hamdan and other detainees at Guantanamo, *infra* at 14-17, make waiting for case facts to be developed unhelpful at best.

In all events, this Court may not have another opportunity to address the legal challenges as presented here. While the court of appeals assumed that Mr. Hamdan could return to federal court following a conviction by military commission, Pet. App. 13a, the availability of such review is in question; the commission rules themselves deny defendants a right to review by a civilian federal court.[5] And review following conviction by a commission with rules of evidence and procedure that fall far short of U.S. military or criminal justice standards would so prejudice the record against defendants as to undermine the fairness of any subsequent proceeding.

## II. THE MILITARY COMMISSIONS CHALLENGE BOTH BASIC FAIR TRIAL RIGHTS AND THE RULE OF LAW AND WARRANT THIS COURT'S REVIEW

Unlike any ordinary interlocutory appeal or request for review of a U.S. criminal proceeding, where this Court can assume the fundamental integrity of the criminal justice system, *see Kowalski v. Tesmer*, 125 S. Ct. 564, 569 (2004) (*quoting Ruhrgas AG v. Marathon Oil Co.*, 526 S. Ct. 574, at 586 (1999)), the military commissions challenged in Mr. Hamdan's petition for certiorari deny those subject to its jurisdiction some of the most basic fair

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[5] The Executive Order establishing the commission states that the military commission has exclusive jurisdiction over an individual and that the individual may not "maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." Executive Order § 7 (b).

trial rights. Pet. App. 35a-36a; 46a-47a; Pet. Br. 1-2, 15-20.[6] More to the point, the commissions as designed reject principles the United States has long understood as fundamental to the rule of law itself. A challenge of this nature goes to the core of this Court's role in our democracy, and the Court should not here decline to take it up. *See Youngstown Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.").

While the term "the rule of law" is often used to encompass a wide range of concepts of fairness, due process, and judicial engagement, few familiar with the U.S. legal system would dispute that it includes at its most basic the ideas that individuals are governed by publicly known regulations, set in advance, applied without arbitrariness, and enforced by fair and independent courts. *See* Richard H. Fallon, *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997). The military commissions challenged here reflect none of these principles, and require this Court's early review.

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[6] The examples most relevant to this appeal are commission regulations permitting the exclusion of the accused from proceedings and the introduction of evidence against the accused without access to that evidence. 32 C.F.R. §§ 9.6(b)(3), (d)(5). The recently announced changes to Military Commission Order No. 1 do not significantly alter this imbalance. Under the new regulations, the presiding officer may still preclude the accused from attending the trial or gaining access to particular evidence. Military Commission Order No. 1, §§ 6(b)(3), 6(D)(5) (Rev. Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. Conducting a hearing in such a manner continues to violate the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), as well as international humanitarian and human rights law, GPW, art. 105; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, arts. 72, 74; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, art. 75(4)(a), (g); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(d)(3); and the Uniform Code of Military Justice, 10 U.S.C. §§ 836 (a), 839(b).

The commission process Mr. Hamdan has faced has never been governed by publicly known regulations set forth in advance. Created in November 2001, after acts for which Mr. Hamdan is accused were already completed, Military Commission Charge Sheet, *U.S. v. Hamdan* §§ 13-14 (July 13, 2004), the commissions are based on a set of rules that have been changed, revised or amended eight times since 2001, Human Rights First, *Trials Under Military Order* i-ii (Oct. 2004).[7]

Rule changes announced by the Defense Department on August 31, 2005, following the submission of Mr. Hamdan's instant petition for certiorari (and a week before Respondent's own briefing deadline in this Court), are the most recent case in point. Dep't of Defense News Release: Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures (Aug. 31, 2005), http://www.defenselink.mil/releases/2005/nr20050831-4608.html ("DoD will continue to evaluate how we conduct commissions and, where appropriate, make changes that improve the process.")

Indeed, the variable nature of the commission structure is by design. The Military Commission Order establishing the commissions reserves for the Executive the discretion at any time to change any of the commission rules. 32 C.F.R. § 9.11. And commission regulations provide that they are "not intended to and do[] not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person." *Id.*, at § 9.10; *see also* Executive Order § 7(c). Like an illusory contract, the commission rules impose no burdens upon the Executive and confer no benefits on the

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[7] Indeed, in the minutes before the opening day of pretrial proceedings in August 2004, trial observers and participants were instructed what would happen if "protected" information were accidentally revealed in open court. Among other things, the order required observers to turn over any notes taken so they could be reviewed and redacted. *See* Human Rights First Military Commission Trial Observations, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day5.

defendant. A proceeding without rights, duties, or binding constraints cannot be considered a process of law at all.[8]

The commissions also appear fundamentally arbitrary as applied. Individuals slated for military commission prosecution appear to have been chosen based on the perceived ease of prosecution rather than the seriousness of their crimes. Mr. Hamdan's detailed military counsel was only appointed "for the limited purpose of negotiating a plea." Pet. Br. 2. Recent press reports indicate that prosecutors were given to understand in 2004 that "the first four defendants would be 'handpicked' to ensure that all would be convicted." Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, A1. If Mr. Hamdan were Afghan and now in Afghanistan, he would be eligible for a full amnesty.

Further, charging offenses under commission rules were set forth in an order issued July 14, 2004, eight years after Mr. Hamdan's allegedly unlawful acts began. The Executive maintains the ability to draw such charging offenses not from some fixed body of criminal law, knowable with certainty in advance, but partly from international law, partly from U.S. criminal law, partly from the Uniform Code of Military Justice – in a mix knowable only to the Executive at his own discretion. *See* Presiding Officers Memorandum (POM) # 1-1 (August 12, 2004), http://www.defenselink.mil/news/Aug2004/d20040818POM1-1.pdf (defining "Commission Law . . . [as] collectively . . . the

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[8] Respondent has portrayed common law military commissions historically as proceedings in which the President set procedures with "no substantial restrictions." Brief for Appellants at 52, 57, 60-61, *Hamdan v. Rumsfeld*, 415 F.3d 33(D.C Cir. 2005) (No. 04-5393). This view is not consistent with military history. "[A]s a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission...while in general less technical than a court-martial, [would] ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence." W. Winthrop, *Military Law and Precedents, Vol. II* (1896 ed.) 1313. *See generally* David Glazier, *Note, Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified or supplemented"). Thus, for example, commission regulations define elements of charging offenses so broadly as to sweep offenses normally viewed as civilian crimes within the definition of "war crimes." *See* Human Rights First, *Trials Under Military Order*, 9-10, http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf.[9]

Finally, as Mr. Hamdan's case makes clear, commission rules and rulings are not designed to be policed by civilian judicial (or any) review independent from executive control. The President determines that an individual is subject to commission jurisdiction; and executive branch officials are solely responsible for creating commission rules, defining the crimes to be tried by them, and staffing the military trial and review panels sitting in judgment. 32 C.F.R. §§ 9.2, 9.4(a)(1).. James Madison pronounced such an "accumulation of all powers, legislative, executive, and judiciary in the same hands" as "the very definition of tyranny." FEDERALIST No. 47 (J.R. Pole ed. 2005). This Court should grant certiorari to ensure that no such outcome is possible.

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[9] The "law of war" limits military commission jurisdiction to offenses related to "armed conflict". Commission regulations, however, stretch the term to the breaking point, specifying that "armed conflict" need not include "ongoing mutual hostilities, or a confrontation involving a regular national armed force." Isolated incidents and even attempted crimes, if severe, may suffice. Military Commission Instruction, No. 2, § 5(C). http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. Thus, the commissions may try crimes such as hijacking or terrorism that have traditionally fallen outside military jurisdiction. *Id.*; *Trials Under Military Order*, *supra*, at 9-10.

## III. FAILURE PROMPTLY TO RESOLVE THE FUNDAMENTAL ISSUES IN THIS CASE WILL HAVE PROFOUNDLY NEGATIVE CONSEQUENCES FOR THE UNITED STATES AND THOSE IT DETAINS

The negative consequences of allowing the commissions' legality to go unresolved are profound. Mr. Hamdan and others similarly situated remain at increasingly serious risk of lasting physical and psychological harm. Brief of Amici Curiae Human Rights First, Physicians for Human Rights, et al. in Support of Petitioner, *Hamdan v. Rumsfeld*, 125 S. Ct. 972 (2005) (No. 04-702). And the United States' ability to promote compliance with international treaty rights overseas is severely undermined. Pet. App. 34a (*citing* Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, at 77-80 (2003)).

### A. The Individual Costs

As this Court has repeatedly recognized, the risk of ongoing harm or imminent injury to a petitioner may be grounds for considering a case promptly. *See, e.g., Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004) (expedited briefing schedule to review president's power to indefinitely detain U.S. citizen as "enemy combatant"). These interests are particularly compelling where, as here, delay may prolong harms of constitutional magnitude. *See, e.g., Jones El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (preliminary injunction to address conditions of confinement that "deprive prisoners of the 'minimal civilized measure of life's necessities'"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (lack of social contact, isolated location, and indefinite sentences of inmates at Pelican Bay prison violates Eighth Amendment rights of inmates who are mentally ill or have borderline personality disorders) ("If the particular conditions . . . being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants . . . have crossed into the realm of psychological torture.").

Since his capture in Afghanistan in late 2001 and transfer to Guantanamo in 2002, Pet. App. 1a, Mr. Hamdan and those like him have been subject to treatment that would be unlawful at any federal detention facility in the United States – including prolonged solitary confinement and detention without charge.[10] Mr. Hamdan alleges he has been subject to beatings by U.S. forces, made to sit motionless for days, dressed inadequately in subfreezing temperatures, and threatened with death, torture and lifelong imprisonment. Pet. App. 77a-78a. From December 2003 until late October 2004, Mr. Hamdan was held in solitary confinement in an eight-by-five foot steel detention cell, denied contact with other detainees, and permitted only very limited access to a translator. Mr. Hamdan's appointed military lawyer, Lt. Cmdr. Charles Swift, described his client during that time as suffering "uncontrollable weeping at inappropriate times, undirected anger, and unresponsiveness," and expressing a desire to kill himself. During his solitary confinement, Mr. Hamdan lost on the order of 50 pounds.

Press accounts and internal investigations have now documented an alarming number of incidents of abuse against Guantanamo detainees. *See, e.g.*, Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, Lt. Gen. Mark Schmidt, Brig. Gen. John Furlow, 18-20 (Released July 13, 2005) (detainee tied to a leash and led around like a dog, forced to wear women's undergarments; stripped of clothing, held in isolation facility for 160 days and subjected to "48 of 54 consecutive days of 18 to 20-hour interrogations"); Carol D. Leonnig, *Guantanamo Detainee Says Beating Injured Spine*, Wash. Post, August 13, 2005, at A18 (later exonerated detainee's allegations of military investigators who "stomped on his back, dropped him on the floor and repeatedly forced his neck forward soon after his arrival at the

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[10] *See Bell v. Wolfish*, 441 U.S. 520 (1979) (conditions of pretrial detention violate due process when they amount to punishment); *see also Chambers v. Florida*, 309 U.S. 227, 237 (1940) (listing solitary confinement along with "[t]he rack, the thumbscrew, [and] the wheel," as methods of compulsion used through the centuries to obtain confessions, leaving "their wake of mutilated bodies and shattered minds").

prison," breaking his vertebrae and confining him to a wheelchair); Josh White, *Abu Ghraib Dog Tactics Came From Guantanamo*, Wash. Post, July 27, 2005, at A14 (military court testimony describing the use of dogs, sleep deprivation, and forced nudity at Guantanamo, in which the dog handlers allegedly participated in a contest to see who could make more detainees urinate or defecate on themselves); Neil A. Lewis and David Johnston, *New F.B.I. Files Describe Abuse of Iraq Inmates*, N.Y. Times, Dec. 21, 2004, at A1 (July 2004 F.B.I. report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subject to freezing temperatures, or temperatures "well over 100 degrees"); Neil A. Lewis, *F.B.I. Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004, at A19 (describing cases in which a female interrogator squeezed one male detainee's genitals and bent back his thumbs; a prisoner was "gagged with duct tape that covered much of his head"; and a dog was used to intimidate a detainee); Josh White and John Mintz, *Red Cross Cites 'Inhumane' Treatment at Guantanamo*, Wash. Post, Dec. 1, 2004, at A10 (describing July 2004 Red Cross report to Pentagon finding use of forced nudity, severe temperatures, and other incidents of psychological and physical abuse at Guantanamo); Letter from T.J. Harrington, Deputy Ass't Dir., Counterterrorism Division, Federal Bureau of Investigation to Major General Donald J. Ryder, Dep't of the Army, Criminal Investigation Command 2 (July 14, 2004) (describing FBI agents' November 2002 observation of a detainee, who after more than three months in isolation in "a cell that was always flooded with light," exhibited "behavior consistent with extreme psychological trauma," including "talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end").[11]

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[11] These reports echo accounts of other prisoners from Guantanamo. *See, e.g.*, Complaint, *Rasul v. Rumsfeld*, No. 04 Civ. 1864 (D.D.C. filed Oct. 27, 2004), at 24-38 (alleging treatment suffered by Rasul and others at Guantanamo as including severe beatings, intimidation by dogs, exposure to extreme heat and cold, and up to 30 days in isolation); Petition for Writ of Mandamus and/or Writ of Habeas Corpus, *Al Qosi v. Bush, et al.*, No. 04 Civ. 1937 (D.D.C. filed Nov. 8, 2004), at 12-17 (alleging techniques used on commission defendant Al Qosi and others as including sexual taunting, isolation in frigid temperatures, threats of transfer to countries known to use torture, and being strapped to the floor wrapped in an Israeli flag). They also indicate that detainees may witness the abuse of

The serious mental and physical health effects of such treatment are well documented and long understood. The so-called "Philadelphia System" used in the late eighteenth century United States relied on "the complete isolation of the prisoner from all human society," but produced incidences of psychiatric disturbance that were so dramatic and widespread that "its main feature of solitary confinement was found to be too severe." *In re Medley*, 134 U.S. 160, 168 (1890) (statutory solitary confinement provision adopted during this era after a defendant committed the charged crime constituted additional punishment for ex post facto purposes); *see also* Larry E. Sullivan, *The Prison Reform Movement: Forlorn Hope* 5-9, 12-13 (1990).

Uncertainty surrounding one's fate in detention only exacerbates the impact of prolonged isolation. *See Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari) (*quoting In re Medley*, 134 U.S. 172) (statute requiring time of execution of sentence to be kept secret from prisoner was additional punishment for ex post facto purposes, as "one of the most horrible feelings to which [one] can be subjected" while awaiting execution is "the uncertainty during the whole of it," and such "secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment"). Indeed, studies of victims of torture and coercion often find victims reporting that the worst part of their detention was the time between interrogation sessions, "when they were frightened of what was going to happen." John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* 47, 170 (2000) (*citing* Ole Vedel Rasmussen, *Medical Aspects of Torture*, 37 Danish Med. Bull. 1 (1990)).

Under the circumstances, it is unsurprising that mental illness at Guantanamo is widespread. In January 2003, monitors from the International Committee of the Red Cross took the extraordinary step of reporting publicly its observation of a "worrying

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their fellow detainees, compounding their fear. *See* David Rose, *Guantanamo: The War on Human Rights* 72 (2004).

deterioration in the psychological health of a large number of [internees]." International Committee of the Red Cross, Guantanamo Bay: Overview of the ICRC's Work for Internees (2004), http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/951C74F20D2A2148C1256D8D002CA8DC. Red Cross observers attributed the deterioration to the uncertainty of the detainees' fate and their lack of legal recourse. Rose, *supra*, at 67. By September 2003, there had been 32 suicide attempts by Guantanamo detainees. *Assessing the New Normal*, *supra*, at 53. Since then, detainees' efforts to injure themselves have been reclassified as "manipulative self-injurious behavior" – a classification unknown in the psychiatric literature. Rose, *supra*, at 65-66. According to Guantanamo Chief Surgeon Cpt. Stephen Edmonson, the drug most often prescribed to detainees is Prozac and analogous medications; as of fall 2003 more than one-fifth of Camp Delta inmates were taking such drugs. *Id.* at 66.

B. The Political Costs

The possibility that commission proceedings will resume again without legal clarity – without this Court's intervention – will further undermine the U.S. ability to advance rule of law protections in fragile democracies abroad. Military commission trials and related operations at Guantanamo Bay under the exclusive control of the Executive Branch have encouraged other nations to dispense with independent judicial mechanisms the United States has long championed.

The United States has historically criticized nations that convened military tribunals, contending that such tribunals reflected political rather than legal norms. Indeed, the U.S. State Department has routinely advocated on behalf of U.S. citizens that their cases be heard in civilian courts rather than military tribunals. *See* Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 341 (2002) (discussing State Department criticism of Burma, Colombia, Egypt, Peru, and Turkey).

Yet today, other countries have embraced the United States' establishment of military commissions as support for their legal and military policies that offend numerous human rights. *See Assessing the New Normal*, *supra*, at 92-95. Egyptian President Hosni Mubarak found vindication of his country's approach, stating the military commissions proved "that we were right from the beginning in using all means, including military tribunals, to combat terrorism . . . There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual." *Id.* at 93 (*quoting* Joe Stork, *The Human Rights Crisis in the Middle East in the Aftermath of September 11*, Cairo Institute for Human Rights Studies 6).

Such measures by the United States have also impeded its efforts to enable and support human rights reforms in other nations. Indonesia, for example, now questions the moral authority of the United States to criticize its human rights record. Human Rights First, *Reformasi and Resistance: Human Rights Defenders and Counterterrorism in Indonesia*, at 2, 20, http://www.humanrightsfirst.org/defenders/pdf/reformasi-resist-052505.pdf. Similarly Russian President Vladimir Putin has muted U.S. criticism of its authoritarian counterterrorism policies by characterizing the U.S. critique as a "double standard," ignoring its own practices. Human Rights First, *The New Dissidents: Human Rights Defenders and Counterterrorism in Russia*, at 2, 6, http://www.humanrightsfirst.org/defenders/pdf/new-dis-russia-021605.pdf.

Finally, subjecting Guantanamo detainees to commission trials as structured also endangers our own citizens abroad. The Geneva Convention regime depends in important part on the reciprocal adherence to the treaties. When the United States casts off trial protections that should be afforded any one captured by a "Detaining Power," it encourages other nations to act in kind, jeopardizing the fates of other Americans. *See* Brief of Amici Curiae Former Prisoners of War and Experts on the Law of War in Support of Petitioners at 18-22, *Hamdi v. Rumsfeld*, 124 S. Ct 2633

(2003) (No. 03-6696). Such considerations do not provide a legal basis for resolution of Mr. Hamdan's case, but they should underscore the importance of this Court's swift and certain engagement with the issues.

## CONCLUSION

For the foregoing reasons, Amicus asks that this Court grant Mr. Hamdan's Petition for Certiorari.

Respectfully Submitted,

Deborah N. Pearlstein*
Director, U.S. Law and Security Program
Human Rights First
100 Maryland Avenue, N.E., Suite 500
Washington, D.C., 20002-5625
(202) 547-5692
*Counsel of Record

Avidan Cover
Kenneth Hurwitz
Human Rights First
333 7th Avenue, 13th Floor
New York, NY 10001-5004
(212) 845-5200
Counsel for Amicus Curiae

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